NO. 80-581

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MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General
of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas, 66612
(913) 296-2215

Attorneys for Kansas

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The State of Kansas, by and through its Attorney General, Robert T. Stephan, appears *parens patriae* on behalf of its citizens and files this brief pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Long-term coal contracts between Kansas electric utility companies and Wyoming coal producers require the purchase of hundreds of millions of tons of low-sulphur coal from Wyoming during the remainder of this century. One such utility alone, The Kansas Power and Light Company, is committed to purchasing 276,136,000 tons of Wyoming coal during the remainder of a contract expiring in the year 2013.

Annual demand for coal to serve new power plants in Kansas--those planned but not yet in operation--has been projected to equal more than ten million tons by 1992, with total shipments in that year of coal from Wyoming to Kansas amounting to more than sixteen million tons. See Argonne National Laboratory, Survey of Electric Utility Demand for Coal 197-322, 336-43 (August 1979).

Kansas utilities have been driven to look to Wyoming coal, in large part, by Federal clean air and energy statutes. Coal mined in the western states--principally Wyoming and Montana--meets air-quality requirements of Federal law far better than coal from any other region. These two states together have 68 percent of the nation's low sulphur coal. At the same time, utilities in Kansas and elsewhere are

now under great pressure, again principally from Federal statutes, to use coal instead of other fuels. As a practical matter, Kansas utilities can fulfill their needs for energy resources and their obligations to their customers only through the use of such coal.

As one consequence of these Federal mandates, the citizens of Kansas are captives of state tax policies in other states which are, therefore, in a position to take extraordinary and unreasonable economic advantage of their plight. Wyoming and its local subdivisions presently impose large severance taxes on the value of this coal, amounting to approximately 17-1/2 percent of value. Since fuel-related costs of electricity generation flow into consumers' monthly bills, these taxes are ultimately borne by the

consumers of electric energy in, among other places, Kansas. The net effect of such taxes is to shift millions of dollars from Kansas consumers to the Wyoming treasury.

Massive amounts are involved. At present tax rates and at the current prices of coal, about $1.00 per ton is paid by Kansas Power and Light to the State of Wyoming in severance taxes. As the price of the coal escalates, of course, the amount of the tax will increase as well, even assuming the Wyoming tax rate remains unchanged. By 1987, it is estimated at least $26.5 million per annum will be shifted from Kansas consumers to the State of Wyoming through these taxes.

The questions presented in this appeal arise out of a constitutional

challenge to the 30 percent Montana Coal Severance Tax (Montana Code Annotated, 15-35-101 et seq.), but they have equal application to Wyoming's power to continue, and potentially to increase, its taxes. They are, therefore, of great interest to the citizens of Kansas.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by this appeal are substantial from both a practical and a constitutional point of view. To avoid burdening the Court with unnecessary argument, we simply subscribe to the arguments set forth in appellants' Jurisdictional Statement, adding the following comments:

1. The Montana Supreme Court held that the Commerce Clause imposes no limit on the power of the states to tax

energy resources destined for immediate delivery to other states, relying on a series of older cases. See Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); Hope Gas Co. v. Hall, 274 U.S. 284 (1927). The principal issue presented by appellants' Commerce Clause claim is one which has not been examined here for more than 50 years. Both practical circumstances and constitutional doctrines have changed markedly over the intervening decades. They strongly recommend reconsideration of those old decisions.

No one in this proceeding has suggested the Commerce Clause deprives the states of their power to tax extraction of energy or other resources located within their borders, at least to the extent that such taxes bear some

fair relation to services and protection provided by the state. At the same time, excessive taxation which falls principally on resources destined for other states--taxation all out of proportion to the legitimate needs of the taxing state--has serious effects on consumers in those states and on our nation-wide economy. The facts of this case bring these effects into vivid focus. The practical effect is that citizens of coal-poor states where electric generation is coal-fired--such as Kansas--may effectively be held hostage to those which happen to be rich in that mineral resource. It is clear excessive taxes, such as the Montana tax is alleged to be, are antithetical to the principles underlying the Commerce Clause and should, in appropriate circumstances, be struck down under that Clause.

2. The Montana Supreme Court also held it could discern no Federal policy which could be frustrated by Montana's tax. That holding, derived without any factual record, does not conform to practical reality. The electric utility companies serving Kansas are among the leaders of their industry in converting electrical generation from oil to coal-fired. In doing so, the utilities have done more than any other institution to move the nation from dependence on foreign oil toward secure, domestic fuels. This conversion has taken place in response to the mandates of a clear national policy.

Excessive taxes manifestly have the potential to frustrate Federal policies by making coal unnecessarily expensive, thereby discouraging its production and use. At some point,

excessive taxes should be held to be contrary to national policies which encourage, require, or mandate the use of coal. Appellants' have argued that Montana's tax has reached that point. They should be given an opportunity to prove their allegations.

CONCLUSION

For the reasons set forth above, and for those contained in the appellants' Jurisdictional Statement, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

DATED: November 6, 1980.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General
of Kansas

BRUCE E. MILLER
Deputy Attorney
General of
Kansas

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT were mailed by depositing same in the United States Mail, first class postage prepaid, this 7th day of November, 1980, to:

HON. MICHAEL T. GREELY, Attorney General of Montana, State Capitol, Helena, Montana, 59601; WILLIAM J. CARL, ESQ., Senior Counsel, Montana Power Company, 40 East Broadway, Butte, Montana, 59701; ROGERS & WELLS, Attorneys at Law, 200 Park Avenue, New York, New York, 10166; HON. MARK WHITE, Attorney General of Texas, Supreme Court Building, P.O. Box 12548, Austin, Texas, 78711; LEO F. J. WILKING, ESQ., Special Assistant Attorney General for State Tax Commissioner, State Tax Department, State Capitol, Bismarck, North Dakota, 58505.

Bruce E. Miller

Bruce E. Miller
Deputy Attorney General
of Kansas